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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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# No. 985

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MARRS McLEAN,

*Petitioner*

*v.*

STATE OF TEXAS.

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**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS, AT GALVESTON, TEXAS, AND BRIEF AND AUTHORITIES IN SUPPORT THEREOF.**

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*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Marrs McLean, is seeking a writ of certiorari to the courts of last resort in Texas against their action to the prejudice of petitioner in denial of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States; and, as preliminary to the formal grounds presented herein, he makes the following:

**Preliminary Statement**

This was a suit brought by the State of Texas, respondent, against petitioner, Marrs McLean and Stanolind Oil

& Gas Co., for ad valorem taxes on an alleged interest in realty. Judgment was rendered for respondent against petitioner in the trial court. The case was appealed to the Court of Civil Appeals and there affirmed, with written opinion of that Court reported in 181 S. W. 2d, 725 (Copied herein, R. 21-24). Motion for rehearing was filed (R. 25-27) and overruled (R. 28).

Application for writ of error was timely made to the Supreme Court of the State of Texas (R. 29-42), which was refused on October 25, 1944 (R. 50); and motion for rehearing on said application, duly and timely filed (R. 50-58), was, as the final judgment in this cause, overruled on the 6 day of December, 1944 (R. 58-59).

The pleadings and facts as developed in the case, as shown by the opinion of the Court of Civil Appeals, were that petitioner, Marrs McLean, was the owner of certain oil, gas, and mineral leases on land in Galveston county, Texas, and that petitioner on the 18th day of March, 1931 sold and conveyed and assigned said leases to the Yount-Lee Oil Co., and, following the detailed description of the properties described in the assignment (R. 18), it stated the consideration therefor, which is quoted as the same appears on pages 19-20 of the record, as follows, to-wit:

> "The consideration for this transfer and assignment of said above described oil, gas and mineral leases and physical properties and equipment is as follows:
>
> "(a) The sum of One hundred thousand ($100,000.00) Dollars cash, receipt of which is hereby acknowledged by Grantor;
>
> "(b) Two hundred thousand ($200,000.00) Dollars, due and payable six (6) months after the date hereof, and Two Hundred Thousand ($200,000.00) Dollars due and payable twelve (12) months after the date hereof; said deferred payments to bear no interest;

"(c) Two Million ($2,000,000.00) Dollars to be paid out of one-eighth (1/8) of the (gross) oil produced and saved from the lands covered by this assignment, if, as and when produced and saved, and only in such event; it being expressly understood in this connection that said Yount-Lee Oil Company shall be under no obligation whatever to Grantor herein to drill upon or develop said land, or any part thereof, for oil.

"There is reserved and excepted from this assignment a royalty of twenty five (25%) per cent of the oil produced and saved from the lands covered by this assignment, out of which twenty-five (25%) per cent royalty all outstanding royalties (including royalties due lessors under the terms of said leases) and all overriding royalties are to be paid, and Grantor is to receive the balance of said twenty five (25%) per cent royalty; *it being understood in this connection that said YOUNT-LEE OIL COMPANY shall in any event be entitled to receive seventy-five (75%) per cent of the oil produced and saved from said land, and that all outstanding royalties, overriding royalties and/or interest of any character in the oil in, under or produced from said land shall be charged against* the twenty-five (25%) per cent royalty herein reserved." (Emphasis ours.)

The evidence was undisputed that it was the intent and purpose of the parties to the assignment specifically to make and constitute the obligation of $2,000,000.00 "personal property and not an interest in land as those phrases are used in the taxing statutes; and after Yount Lee Oil Company acquired the leases it regarded itself as owner of 75% of all the oil under and produced from the lands covered by said leases, and paid all ad valorem as well as gross production taxes due thereon, treating and considering petitioner's said obligation of $2,000,000.00 as personal property and not an interest in land; and the Stanolind Oil & Gas Company after acquiring said leases from the

Yount Lee Oil Company on July 31st, 1935, to the year 1939, regarded itself as the owner of, and rendered and paid taxes on 75% of all oil under and produced from the lands covered by said leases, as real estate. The Stanolind, however, in the year 1939, for the first time declined to pay the ad valorem taxes on so much of the 75% as represented the oil payment, and this suit is to recover the ad valorem taxes subsequent to the year 1939; and the Court rendered judgment against McLean in the sum of $8,444.19 for the taxes for four years preceding the filing of this suit, which judgment was affirmed by the Court of Civil Appeals, and adopted by the Supreme Court of Texas in refusing petitioner's application for writ of error, and motion for rehearing thereon on the 6 day of December, 1944, thereby constituting the final judgment in the case.

In its opinion the Court of Civil Appeals adopted the facts of the trial court, as shown in said opinion as follows:

"The Court expressly found that the appellant and the attorney for the transferee carefully worded the transfer with the intention of making the oil payments personal property so as to place the burden on the transferee of liability for ad valorem taxes on the full 75%, to the end that appellant should not have to pay any part of the ad valorem taxes thereon." And further: "Also it was undisputed that the Yount-Lee paid all ad valorem taxes on the 75% so long as it continued to own same, as well as paid 75% of the production tax. Thereafter, on July 31, 1935, the Yount-Lee disposed of the working interest in said leases, and on the same day the Stanolind acquired it. And the Stanolind continued to pay taxes in the same way as the Yount-Lee had done, until the year 1939" (R. 22-23).

The Court of Civil Appeals in its opinion, after finding the above facts, affirmed the judgment of the lower court in the following language:

> "If, in fact, the entire working-interest, to the extent of 75% of the mineral estate, passed by the transfer to the Yount-Lee, as the parties intended and supposed, then, necessarily, the oil-payment obligation would be personal property. But the intentions of parties cannot change the character of an estate which is fixed by law, and which they by their acts create. When the appellant retained the right to share in the oil production to the extent of 12½% thereof, or its money equivalent, he retained the right to share in the profits—in the profits a prendre out of the 75% working interest. Such right is an interest in land. Sheffield *v.* Hogg (Sup. Ct.) 77 S. W. 2, 1021" (R. 23-24).

## Grounds of Jurisdiction of the Supreme Court and Reasons for the Allowance of the Writ

### First Ground

The Supreme Court of the United States has jurisdiction of this cause because the Texas Courts in this case have erroneously adjudged against Petitioner and taxed as real estate in Galveston County, Texas, said obligation of $2,000,000.00 owed him as a part of the consideration for the assignment of the leases, thereby ruling that he was the owner of the realty conveyed by his assignment; whereas, it was, under the settled laws of Texas, personal property taxable in Bexar County, Texas, the residence of assignor, the petitioner, which the tax authorities of Galveston County intentionally and systematically, from 1931 to 1939, exempted from land taxation, holding it intangible personal property in the same class as all other personal property of like kind, of citizens of Texas. Thereby said tax authorities of Galveston County, and the Courts of Texas, in

sustaining their action in now holding and adjudging said obligation as realty instead of personalty, have denied to petitioner the equal protection of the laws of Texas and the due process of law, in contravention of the second clause of the first section of the 14th Amendment to the Constitution of the United States, as construed in the case of *Waggoner Estate* v. *Wichita County*, 273 U. S., 113, 71 L. Ed. 566.

SECOND GROUND

This Court has jurisdiction of this cause because of the error of the Courts of Texas in denying petitioner the equal protection of the laws of Texas, which he expressly relied upon in his Motion for Rehearing in the Court of Civil Appeals and in his application for writ of error to the Supreme Court of Texas, guaranteed to him under the second clause of the first section of the 14th Amendment to the Constitution of the United States, in that the decision and action of said Texas State courts in construing the statutes of taxation in Texas, "have adjudged said statutes to mean one thing for some cases, and another thing for others," because, by their erroneous ruling in this cause said obligation of $2,000,000.00 (which was a part of the consideration, based on a percentage of oil to be produced) has been treated for taxing purposes as real estate, in Galveston County, Texas, instead of personal property taxable in Bexar County, Texas where your petitioner resides; and in so deciding, the Supreme Court of Texas has denied petitioner the equal protection of the law, in this—that the Supreme Court of Texas prior to the date of said assignment had construed such obligations to be personal property, taxable in the county of the residence of the owner thereof, as is shown by the opinion of the Supreme Court of Texas in the case of *Stephens County* v. *Mid Kansas Oil & Gas Co.*, 113 Tex. 160; and in this case the

Supreme Court of Texas has changed its former ruling, with retroactive effect, in classifying said obligation as real estate, when under its former decision, at the time the contract was made, the Supreme Court had held and classified it to be personal property.

THIRD GROUND

This Court has jurisdiction of this cause because the Texas Courts, in deciding that said obligation of $2,000,000.00 was real estate instead of personal property, erroneously construed the intent and purpose of the parties to the contract, contrary to and in violation of the uniform construction by the Texas courts of Article 3713, Vernon's Annotated Civil Statutes of Texas, which adopts the common law rule of evidence; one of which is quoted under the statute as Rule 21, to-wit: "A prior or contemporaneous parol agreement consistent with and forming a part of the contract is to be construed with the written part thereof," in this, that the parties to said assignment orally agreed and understood by its terms that said obligation of $2,000,000.00 forming a part of the consideration of said assignment, should be personal property and not a reservation of an interest in the oil; and thereby the Texas Courts, in so deciding, have adjudged said statute to mean one thing for petitioner and another thing for others, as shown by its opinion as follows:

"If, in fact, the entire working interest, to the extent of 75% of the mineral estate, passed by the transfer to the Yount-Lee, as the parties intended and supposed, then, necessarily, the oil-payment obligation would be personal property. But the intentions of parties cannot change the character of an estate which is fixed by law, and which they by their acts create."—and in so ruling petitioner has been denied the equal protection of the laws of Texas,

in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States, and the 5th Amendment to said Constitution.

FOURTH GROUND

This Court has jurisdiction of this cause because the Texas courts, in refusing to give effect to the express verbal intention placed by the parties upon the "worded transfer" making the oil payments personal property, have violated the uniform construction by the Texas Courts of Art. 3713 Vernon's Annotated Civil Statutes, which adopts the common law rule permitting parol evidence to show the intention of parties where the words in a written instrument are doubtful, making the contract ambiguous when applied to the subject matter thereof; and in so deciding have construed said statute contrary to the uniform construction by the Supreme Court in other cases, when the Court, in its opinion held "It is therefore immaterial what the purpose and intention of the parties to the transfer were at the time they drafted said transfer, except as the same is expressed by the terms of said transfer," and in so holding they denied petitioner the equal protection of the law of the State of Texas, in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States.

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## Assignments of Error

Supplementary to and prayed to be considered upon the granting of the writ of certiorari, upon the merits of the case, petitioner presents the following assignments of error.

### First Assignment of Error

The Court of Civil Appeals erred in affirming the judgment of the trial court, and the Supreme Court in refusing

petition for writ of error thereby adopting the ruling of the Court of Civil Appeals, in holding that the obligation of $2,000,000.00 as a part of the consideration for the assignment, to be paid out of 1/8th of the gross oil produced and saved, is an interest in realty, taxable in Galveston county, Texas, instead of being personal property taxable in the county of the residence of petitioner, Bexar county, Texas.

**Second Assignment of Error**

The Supreme Court of Texas, by its final judgment in overruling petitioner's motion for rehearing, erred in not granting said writ of error and reversing the judgment of the lower court and rendering judgment in favor of petitioner, because of the error of said courts, and the Supreme Court in not correcting the same, in holding that petitioner is the owner of the interest as realty on which judgment for taxes was rendered against him.

WHEREFORE your petitioner most respectfully prays that a writ of certiorari be issued out of this Honorable Court, directed to the Honorable Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, Texas, commanding that court to certify and forward to this Court for its review and determination, on a day therein to be named, a full and complete transcript of the record and all proceedings in the case of Marrs McLean v. The State of Texas, being No. 11,628 on the docket of that court, wherein this petitioner is designated as Appellant, and the State of Texas as Appellee; that the judgment of that court be reversed by this Honorable Court, and that the judgment of the District Court, which was affirmed by said Court of Civil Appeals and the Supreme Court of Texas, be reversed and here rendered in favor of petitioner against respondent, the State of Texas; that Respondent, the State of Texas, take nothing by its suit against petitioner, and all costs.

And since the proceedings of said Court of Civil Appeals have, by the refusal of your petitioner's application for writ of error addressed to the Supreme Court of Texas, been in legal effect by that court approved, your petitioner prays that writ of certiorari be issued to that Court (if, under the facts of this record such be required), and that the relief hereinabove asked as against the order of that tribunal approving as final the judgment and decree of said Court of Civil Appeals be granted to your petitioner, so that the wrongs and injuries inflicted upon him be by this Honorable Court revised, reviewed and corrected, and that he be given the relief as herein sought and prayed for.

Your petitioner prays for such other and further relief in the premises as this honorable court, upon a hearing of this petition and the cause, may deem just.

WILLIAM D. GORDON,
*Beaumont, Texas,*
*Attorney for Petitioner.*

Of Counsel:
E. E. EASTERLING.

[There is filed with this petition the requisite duly authenticated and certified copy of the complete record in this cause, under the hand and seal of the Clerks of the Court of Civil Appeals and of the Supreme Court of Texas.]